

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 05-133
Table of Allotments,)	RM-11206
FM Broadcast Stations.)	
(Abilene and Burlingame, Kansas))	
)	
)	

NOTICE OF PROPOSED RULEMAKING

Adopted: March 21, 2005

Released: March 23, 2005

Comment Date: May 10, 2005

Reply Comment Date: May 25, 2005

By the Assistant Chief, Audio Division, Media Bureau:

1. The Audio Division has before a Petition for Rule Making filed by MCC Radio, LLC ("Petitioner"), licensee of Station KSAJ(FM), Channel 253C1, Abilene, Kansas, proposing the reallocation of Channel 253C1 from Abilene to Burlingame, Kansas, as its first local service and modification of the Station KSAJ(FM) license accordingly.¹ Petitioner stated its intentions to file an application implementing Channel 253C1 at Burlingame, if allotted.

2. Petitioner filed its reallocation request pursuant to Section 1.420(i) of the Commission's rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest in the proposed allotment.² The proposed reallocation of Channel 253C1 at Burlingame is mutually exclusive with the current authorized facilities of Station KSAJ(FM), Channel 253C1, Abilene, Kansas. When considering a reallocation proposal, a comparison is made between the existing allotment and the proposed allotment to determine whether the reallocation would result in a preferential arrangement of allotments based upon the FM Allotment priorities.³ The proposed Channel 253C1 reallocation at Burlingame would provide a first local service, whereas the retention of Station KSAJ(FM) at Abilene would attribute to a second local

¹ Burlingame is an incorporated city located in Osage County with a 2000 U.S. Census population of 1,017 persons. Burlingame has its own city council, consisting of an elected mayor and five elected council members, city clerks, animal control officer, city and court attorney, court clerk. Burlingame also has its own zip code, post office, commercial establishments, health facilities, civic organizations, fire and police departments, public works, public library, municipal court, zoning commission, school district and newspaper, the *Osage County Chronicle*.

² See *Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), recon. granted in part 5 FCC Rcd 7394 (1990).

³ The FM Allotment priorities are (1) First full-time aural service. (2) Second full-time aural service. (3) First local service. (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)], See *Revision of FM Assignment Policies and Procedures*, 90 FCC Rcd 88, 91 (1988).

service.⁴ As such, the reallocation proposal results in a preferential arrangement of allotments based on priority (3), first local service.

3. Petitioner states that the proposed Channel 253C1 reallocation would provide an additional aural service to 393, 661, resulting in a new gain of 228, 266 persons. Petitioner notes that no white or gray areas would be created. However, a small area of 287 persons would receive few than five services, which is consistent with Commission precedent.⁵ The proposed Channel 253C1 facility at Burlingame covers 100 percent of the Topeka, Kansas Urbanized Area within the 70 dBu contour, while the existing Channel 253C1 at Abilene does not cover any part of any urbanized area. In this regard, we are concerned with the potential migration of stations from lesser-served rural areas to well-served urban areas. For this reason, we will not blindly apply a first local service preference when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area. In making this determination, we apply existing precedent.⁶ In essence, we consider the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and, most importantly, independence of the suburban community. To this end, Petitioner has submitted a *Tuck* showing demonstrating that Burlingame warrants a first local preference. Therefore, we tentatively conclude that Burlingame is not dependent upon the Topeka Urbanized Area.

4. The proposal warrants consideration because it could provide Burlingame with its first local service. A staff engineering analysis has determined that Channel 253C1 can be allotted to Burlingame in conformity with the Commission's rules, provided there is a site restriction of 17.7 kilometers (11 miles) northwest at coordinates 38-52-29 NL and 95-58-05 WL. In accordance with the provisions of Section 1.420(i) of the Commission's rules, we shall not accept competing expressions of interest pertaining to the use of Channel 253C1 at Burlingame.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>Community</u>	<u>Channel Number</u>	
	<u>Present</u>	<u>Proposed</u>
Abilene, Kansas	253C1	-----
Burlingame, Kansas	-----	253C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required in paragraph 2 of the Appendix before a channel will be allotted.

7. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before May 10, 2005, and reply comments on or before May 25, 2005, and are

⁴ "Unlimited" AM Station KABI is currently licensed to Abilene.

⁵ *Citing Shawnee and Topeka, Kansas*, 19 FCC Rcd 931 (MB 2004), *Park City, Montana*, 19 FCC Rcd 2092 (MB 2004), and *Washington and Watkinsville, Georgia*, 16 FCC Rcd 17876 (MMB 2001).

⁶ *See Huntington Broadcasting Co. v. FCC*, 192 F. 2d 33 (D.C. Cir. 1951); *RKO General*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1998) ("*Tuck*").

advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, SW, TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, as follows:

James R. Bayes, Esq.
Todd M. Stansbury, Esq.
Krista L. Witanowski, Esq.
Counsel, MCC Radio, LLC
Wiley, Rein & Fielding LLP
1776 K Street, NW
Suite 1100
Washington, DC 20006

8. Parties who choose to file by paper must file an original and four copies of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail or Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. **All filings must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission, Office of the Secretary. Any filing that is not addressed to the Office of the Secretary will be treated as filed on the day it is received in the Office of the Secretary. See 47 C.F.R. § 1.7. Accordingly, failure to follow the specified requirements may result in the treatment of a filing as untimely.**

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to a rule making proceeding to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules.⁷ This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

10. For further information concerning a proceeding listed above, contact Rolanda F. Smith, Media Bureau (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision in the applicable docket is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or any summary of any new information shall be served by the person making the presentation upon the other parties to the proceeding in particular docket unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be

⁷ See *Certification that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*. 46 FR 11549 (February 9, 1981).

considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief
Audio Division
Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority found in 47 U.S.C. Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b), and 47 C.F.R. Sections 0.61, 0.204(b) and 0.283, IT IS PROPOSED TO AMEND the FM Table of Allotments, 47 C.F.R. Section 73.202(b), as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off protection. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* 47 C.F.R. Section 1.420(d).)

(b) With respect to petitions for rule making which conflict with the proposals in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in 47 C. F.R. Sections 1.415 and 1.420, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* 47 C.F.R. Section 1.420(a), (b) and (c).) Comments should be filed with the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW-A325, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of 47 C.F.R. Section 1.420, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257) at its headquarters, 445 12th Street, S.W, Washington, D.C.